**UNITED OVERSEAS BANK (MALAYSIA) BHD**

**v.**

**WONG TIANG & ANOR**

HIGH COURT MALAYA, MELAKA
KN SEGARA J
[ORIGINATING SUMMONS NO: 24-295-1998]
28 AUGUST 2000

***LAND LAW:*** *Sale of land - Auction - Proceedings under National Land Code, s. 254 - Letter of demand prior to Form 16D notice includes unlawful sum - Form 16D notice excludes unlawful sum - Notice contains calculation error - Whether notice bad in law - Whether cause to the contrary established - National Land Code, s. 256(3)*

Prior to the issuance of the Form 16D notice, the solicitor for the plaintiff sent a letter of demand to the defendants demanding an amount of money which included a sum not lawfully due. Although, the notice excluded the unlawful sum, it contained a calculation error. Counsel for the defendants argued that the notice therefore was bad in law and thus no order for sale could be granted.

**Held:**

**[1]** The plaintiff's solicitor's letter of demand was not a condition precedent to the issue of the Form 16D notice. Therefore, the incorporation of any sum not lawfully due in the said letter could not invalidate the notice which had in fact excluded such sum. Thus, in the circumstances of the instant case, the notice upon its true construction and purport, was a valid and lawful notice.

**[2]** As the defendants had not established any cause to the contrary, there shall be an order for sale of the land with the usual consequential orders.

*[Order accordingly.]*

**Case(s) referred to:**
*Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36* ***(refd)***
*Syarikat Kewangan Melayu Raya Bhd v. Malayan Banking Bhd [1984] 1 MLJ 115* ***(refd)***

**Legislation referred to:**
National Land Code 1965, s. 256(3)

*For the plaintiff - Karen Cheah; M/s Nik Hussain & Partners*
*For the defendants - Wong Nai Chee; M/s SK Khoo & Tan Tian Tiok*

*Reported by Izzaty Izzuddin*

**JUDGMENT**

**KN Segara J:**

This is a foreclosure action under the National Land Code by the plaintiff against the defendants the owners of land held under PT No. 566 HS(D) No. 30256 Mukim Tanjong Minyak, Daerah Melaka Tengah, Negeri Melaka (hereinafter referred to as "the said land"). The defendants, who were carrying on business as Syarikat Perusahaan Siong Hup, created two (2) charges over the said land in favour of the plaintiff bank in consideration of banking facilities granted to Syarikat Perusahaan Siong Hup. The said charges are exhibited as "UOBB 1" and "UOBB 2" in encl. 3.

There were four (4) banking facilities granted to Syarikat Perusahaan Siong Hup by the plaintiff bank. They were:

(a) Overdraft facility up to the limit of RM500,000.

(b) Fixed loan of RM243,000

(c) Bankers acceptance up to the limit of RM800,000

(d) Bank guarantee: (RM100,000) within the LC/TR/BA line.

The plaintiff's foreclosure action herein is, however, premised in law only on the breach in relation to three (3) of the above four (4) banking facilities, that is, on the breach of the defendants in failing or neglecting to pay to the chargee (plaintiff) the total sum outstanding, as at 21 May 1998, for:

i) the overdraft facility at RM535,768.68, together with interest to the date of full realisation;

ii) the fixed loan facility at RM166,756.62, together with interest to the date of full realisation;

iii) the bankers acceptance of RM605,000 together with interest on all overdue bankers acceptance;

which breach had continued for a period of not less than seven (7) days prior to the date of the Form 16D statutory notice and, which breach the defendants had further failed to remedy within seven (7) days from the date of the Form 16D statutory notice. The fact that the plaintiff's foreclosure proceedings herein is premised only on the three (3) banking facilities referred to above is patently clear from the Form 16D notice itself. There can be no room for any doubt, even the uninitiated and ignorant, that the banking facility for bankers guarantee was not the subject matter of a breach that the plaintiff required the defendants to remedy in the Form 16D notice. There is no reference at all in the form 16D notice to the bankers guarantee, as one of the facilities taken into account, in arriving at the sum of RM1,342,525.30 due to the chargee, as at 21 May 1998. The figure of RM1,342,525.30 is manifestly an erroneous computation of the total sum due on the overdraft facility, fixed loan facility and the bankers acceptance, as at 21 May 1998. The total sum due to the chargee, as at 21 May 1998, should read RM1,307,525.30 (*ie* RM535,768.68 + RM605,000) in line 2 of the 2nd para. of the said Form 16D notice. For ease of comprehension, the whole of the said Form 16D (exhibit "CKS 2") is reproduced below.

NATIONAL LAND CODE
FORM 16D
(Section 254)

NOTICE OF DEFAULT WITH RESPECT TO A CHARGE

To:-

**WONG TIANG (NRIC No. 4415210/530212-04-5373)** and **LOCK KIM LIAN (NRIC No. 4811804)** both of No. 702-J Taman Megah, Bukit Beruang, 75450 Malacca under the Charge described in the Schedule below of the land so described;

**WHEREAS** you have commited a breach of the provisions of this Charge by failing and/or neglecting to pay to the Chargee the sum of RM1,342,525.30 being the total outstanding sum due as at 21.5.1998 consisting of:-

(1) Overdraft Facility of RM535,768.68 together with further interest accruing thereon at the rate of 2% per annum above the Base Lending Rate (current BLR is 12.1% per annum) on monthly rests from 22.5.1998 to the date of full realisation;

(2) Fixed Loan Facility of RM166,756.62 togehter with further interest accruing thereon at the rate of 2% per annum over the base lending rate (current BLR is 12.1% per annum) on monthly rests from 22.5.1998 to the date of full realisation;

(3) Bankers Acceptance of RM605,000 together with further interest accruing thereon at 2% per annum over the base lending rate (current BLR is 12.1% per annum) on monthly rests on all overdue Bankers Acceptance; and

**AND WHEREAS** the breach has continued for a period of not less than SEVEN (7) DAYS prior to the date of this Notice.

We, as Chargee, by virtue of the powers conferred by Section 254 of the National Land Code hereby require you within a period of SEVEN (7) DAYS from the date of this Notice to remedy the breach;

**AND TAKE NOTICE** that if you fail to remedy the breach within that period, we shall apply for an Order for Sale.

Dated this 23rd day of July 1998

Sgd.
**MESSRS NIK HUSSAIN & PARTNERS**
Solicitors for United Overseas Bank (Malaysia) Bhd,
Malacca

Whether a notice of default with respect to a charge/s in Form 16D is bad in law, would depend on whether the chargor has been prejudiced or misled by any defect in the notice as to render the granting of the order of sale unjust, and this in turn must necessarily depend on the circumstances of each particular case (see *Syarikat Kewangan Melayu Raya Bhd v. Malayan Banking Bhd* [1984] 1 MLJ 115 at 118).

In this case before me, just prior to sending the Form 16D notice, the solicitors for the plaintiff sent a notice by letter dated 7 July 1998 to the defendants (exhibit "UOBB 4") With the caption, as follows:

Re: 1. Overdraft (OD) Facility of RM500,000
- outstanding sum of RM535,768.68 as at 21.5.1998

2. Fixed Loan (FL) Facility of RM270,000
- outstanding sum of RM166,756.62 as at 21.5.1998

3. Bankers Acceptance (BA) of RM800,000.
- outstanding sum of RM605,000 as at 21.5.1998

4. Bankers Guarantee (BG) of RM100,000
- outstanding of RM35,000 as 21.5.1998

---

The material parts of this letter reads at paras. 4, 5, and 6 as follows:

> We have further been instructed by our clients that you have breached the terms and conditions stated in the letter of offer in that you have utilised the OD facility exceeding its approved limit, the FL facility is in arrears, the BA is now past due and the BG is now outstanding. Despite our clients' letters to you, you have still failed and/or neglected to respond to the same.
>
> We have been instructed by our clients to inform you that as at 21.5.1998, there was an outstanding sum of RM1,342,525.30 due and owing to our clients. Further interest continues to accrue as follows:-
>
> 1. OD facility - .....
>
> 2. FL vacility - .....
>
> **TAKE NOTICE** that we are instructed by our clients to inform you that as a consequence of your default, the entire Overdraft, Fixed Loan, Bankers Acceptance and Bankers Guarantee facilities are being recalled, and we are to demand from you, which we hereby do, payment of the sum of RM1,342,870.30 (inclusive of legal costs and service tax of RM345.00) together with further interest accruing thereon either to our clients or to us as their solicitors within SEVEN (7) DAYS from date of receipt of this letter hereof, failing which our clients shall apply for an order to sell the charged property and/or issue a Writ of Summons against you for the recovery thereof. In this event, you shall be liable for all interest and costs.

Upon a careful perusal of the above letter of demand it is obvious that the sum of RM1,342,525.30 is arrived at by adding together sums outstanding due on 21 May 1998 on all the facilities referred to in the caption of the letter, including the Bankers Guarantee. The amount due on the bank guarantee, per the caption, is RM35,000. It is not disputed that, as at 21 May 1998, the sum of RM35,000 due on the bankers guarantee given to Tenaga National Berhad, was only a contingent liability, as the said bank guarantee was valid from 29 June 1997 to 28 June 1998 and no call on the guarantee had been made by Tenaga National Berhad. Nevertheless, it would appear that the plaintiff can make a demand from the defendants for this contingent liability, pursuant to cl. 1.1 and cl. 1.1.2 of the charge annexure. Therefore, it was not entirely wrong to have included this sum in the letter of demand sent by the solicitors on 7 July 1998. The defendants were not in any way prejudiced by this inclusion,

and, they could have paid the sum of RM1,342,525.30 less the sum of RM35,000 to the plaintiff, in response to the solicitors' letter of demand, referred to above, to avoid the subsequent Form 16D notice being issued and foreclosure proceedings instituted by the plaintiff. Even if the plaintiff was not entitled in law to demand for the sum of RM35,000 on the contingent liability, as at 21 May 1998, the fact that it was incorporated in the letter of demand sent by the plaintiff's solocitors does not render the subsequent Form 16D notice bad in law, because the said Form 16D notice has excluded the claim on the bankers guarantee for RM35,000.

Counsel for the defendants has quite vigorously persisted that the Form 16D notice is bad in law because it has, for all intents and purposes, incorporated the bankers guarantee of RM35,000 which was not lawfully due and outstanding, as at 21 May 1998. Form 16D must not be read wearing blinkers. It has so clearly set-out the break-down for the respective banking facility on which the breach is based. It would be unjust and unfair to conclude that by reason of the fact that the plaintiff's solicitors letter had incorporated a sum not lawfully due on 21 May 1998, the subsequent statutory notice is deemed to have included sums not lawfully due, as well. The solicitor's letter dated 7 July 1998 is not a condition precedent to the issue of the Form 16D notice. Therefore, the incorporation of any sum not lawfully due in the said solicitors' letter cannot, thereafter, invalidate, in law, the Form 16D notice which has in fact excluded such sum.

Although the defendants had alleged that the plaintiff had breached the agreement with them and that they were never in default, in particular, with regard to the fixed term loan as they had been paying their instalments regularly, this is insufficient to resist an application under s. 256(3) National Land Code. An allegation that the chargee acted in breach of contract while it may give rise to an independent action *in personam*, is insufficient *per se* to defeat the *ad rem* right of a chargee under the registered charge to an order of sale (*Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36).

The only issue before me is whether the Form 16D notice was bad in law because it had purportedly incorporated a sum of RM35,000 not lawfully due. For reasons already stated above, I rule that the Form 16D notice

dated 23 July 1998 is, upon its true construction and purport, in all the circumstances of this case, to be a valid and lawful notice, and, as the defendants have not established any cause to the contrary, there shall be an order for sale of the said land with the usual consequential orders. The amount outstanding on the charge at the date of this order is RM1,719,598.63. The public auction shall be held on 5 February 2001.

Order accordingly.